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IN THE

Supreme Court of the United States.

OCTOBER TERM, ~~1965~~ 1966

No. 4741

HOME SHIPPING COMPANY, S.A., as owner of the S/S *COSMIC*,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No.

HOME SHIPPING CO., S.A., as owner of the S/S *Cosmic*,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Home Shipping Company, S. A., prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on May 4, 1966, affirming a decree of the District Court of Delaware, dated April 8, 1965, dismissing petitioner's suit.

Opinions Below

The *per curiam* opinion of the Court of Appeals for the Third Circuit is not yet reported but is reprinted in Appendix A hereto.

The opinion of the District Court for the District of Delaware is reported in 239 F. Supp. 226 and appears in petitioner's appeal record appendix below (R. 2a-14a).*

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* "R" throughout denotes petitioner's record appendix below. "TR" throughout denotes the trial record.

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed was entered May 4, 1966. A timely petition for rehearing was filed May 19, 1966 and an order denying the same was entered May 27, 1966.

The jurisdiction to review such judgment by certiorari is provided by 28 U. S. C. A. §§ 1254 (1), 2101.

Questions Presented for Review

1. Although the owner of a sunken ship is the United States of America, is not such owner negligent *per se* in not marking the wreck in accordance with U. S. Coast Guard directives, and are not rulings by a District Court and Court of Appeals clearly erroneous that such United States of America was not negligent for such omissions and that the suit of a party injured by the wreck should be dismissed?

2. Is not the judgment hereby sought to be reviewed an example of a Federal Appellate tribunal's misapplication of this Court's decision in *McAllister* v. *United States*, 348 U. S. 19, 20, defining the scope of review by appellate tribunals in admiralty cases as that exercised under Rule 52 (a) of the Federal Rules of Civil Procedure; and is it not an example of a general but not uniform tendency of such tribunals to invest judgments of District Courts based on findings of fact with an implied infallibility and to heavily discount contentions of appellants that improper legal standards of evidence evaluation were applied?

3. An important companion question to question 2 is: did not both the District Court and the Circuit Court commit plain error in finding that the respondent was not guilty of negligence contributing to the collision by their refusal to apply, or overlooking to apply, the well-known Pennsylvania Rule established by this Court in *The Pennsylvania*,

19 Wall. 125, 136, which in effect, makes respondent's violation of the Wreck Act substantially an automatic fault on the respondent's part?

Statutes, Rules and Coast Guard Regulations Involved

We cite below and reprint in Appendix B hereto the following statutes, rules and Coast Guard regulations which are pertinent and involved herein.

STATUTES AND REGULATIONS

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Statement of the Case

a. *The suit and original jurisdiction thereof:* The petitioner sued the United States under the Suits in Admiralty Act (41 Stat. 525 (1920) 46 U. S. C. A. §§ 741-52) for $600,000 damages to petitioner's SS. *Cosmic* resulting from

the collision of the port side of the *Cosmic* with the partially sunken wreck of U.S.N.S. *Mission San Francisco* owned by the Government, in about mid-channel of the Delaware River off New Castle, Delaware, on May 27, 1957, at night.

The wreck's position was across the 800 foot width of the channel called Deepwater Point range and left only 480 feet of the east (in-bound) side of the channel. The *Cosmic,* in-bound, had a deep draft of 37 feet. The Coast Guard permitted use of the narrow eastern segment of the channel at night only to deep draft in-bound vessels. The wreck's stern lay less than three lengths of the *Cosmic* (length 744 feet; beam 100.9 feet) above a sharp 34 degree right turn in the channel.

b. *The wreck marking requirements*: By 14 U. S. C. A. 2, the Coast Guard is responsible for the establishment and maintenance of aids to navigation and promulgation of regulations for the safety of property on United States waters. Appendix B, 18.

The Wreck Act, 30 Stat. 1152 (1899), 33 U. S. C. A. 409, a Safety Act and Navigation Statute, requires the owner of a vessel sunk in a navigable channel where *Mission* was to mark it with buoy on which a green light should be used. Appendix B, 18.

Coast Guard regulations regarding the marking of wrecks are contained in Section 64 of Title 33, Code of Federal Regulations. Provision is there made that markings "shall conform to the lateral system of buoyages characteristics * * *", meaning that proceeding from sea "the left sides of channels or wrecks" are marked by black buoys on which green lights should be used. Sections 64.01-1; 62.25-1; 62.25-5, 20. Appendix B, 19, 20.

Another Coast Guard regulation headed "Buoys marking wrecks" states:

> "Buoys established by the Coast Guard to mark wrecks are generally placed on the seaward or channel side of the wreck and as near to the wreck

as conditions will permit." Section 62.25-40 quoted. Appendix B, 20.

Further, the Coast Guard "aids to Navigation Manual", an instruction guide to its personnel, states:

> "Markings shall be placed on the seaward or channelward side of the wreck as near to the wreck as possible, and shall be so located that a vessel may pass close aboard the marking with safety." Sections 5-6-20 quoted Appendix B, 22.

c. *The occurrence and its decision*: Coming up the reach of the channel just below the sharp right turn above-described and the wreck at reduced speed, the Cosmic's pilot searched ahead with his binoculars for the wreck's marker light and made out both the light and the outline of the wreck at the same time. He maneuvered the engines and rudder to make the quickest right turn but the *Cosmic's* port side scraped along the stern of the wreck.

The wreck's marker light (identified as "WR 3D) did not meet the requirements for a suitable marker light as above outlined, except that it was green in color, in the following respects, which are uncontradicted in the record:

The light was *not* on a buoy astern of the wreck so that the wreck could be safely passed close ahead on the left hand of the *Cosmic* or another passing vessel. Instead, it was on the afterpart of the wreck itself, about 30 feet forward of the wreck's stern. The standard set out in Section 5-6-20 of the Coast Guard Aids to Navigation Manual (above quoted, p. 5) that the marker "shall be so located that a vessel may pass close aboard the marking with safety" was not observed. The purpose of the above standard in the "Aids to Navigation Manual" is there stated to be as follows:

> "5-1-5 Purpose—
>
> A. The purpose of this chapter is to set forth procedures and requirements for the guidance of

> all persons in the Coast Guard concerned with administering the provisions of Title 33, Part 64, Code of Federal Regulations." Ex. 29, R. 112a, Appendix B, 21.

The light was deceptively placed on the north side of the wreck, not on its side nearest to an approaching in-bound vessel, in spite of the fact that the remaining channel used at night was limited to in-bound vessels. The Trial Judge, although by his own admission, "completely a landsman" (Tr. 615), disagreed with the Coast Guard requirements for a lighted wreck *buoy* located so that a vessel might safely pass it close aboard, stating in his opinion:

> "5. The Coast Guard was in the exercise of good judgment in not placing a lighted buoy easterly of Mission's stern." R. 8a.

The Trial Judge also ruled erroneously that Coast Guard Regulation 62.25-40 (quoted above, pp. 4, 5) that while *wreck buoys* are generally placed on the channel side of a wreck as near the wreck as conditions permit, the Coast Guard had the discretion as to placing a marker light on a buoy or not, which he considered was properly exercised. In ruling as aforesaid, the Trial Judge overlooked that the U. S. Coast Guard's own Navigation Manual left no discretion whatever to the Coast Guard Personnel. Section 5-7-15 being in the following text:

> "A. When establishing aids to navigation to mark a sunken wreck, the commanding officer shall adhere to the provisions of Part 5-6 with respect to any details of the marking not otherwise specified by the District Commander." Appendix B, 22.

A significant sequel condemnatory of the respondent is the fact that the morning following the collision, the Coast Guard in marking the portion of the wreck still in the channel, established the marker light *on a buoy* astern of the wreck, just as its Manual Required. Thus, the log of the Lilac for May 28, 1957, contains the following entry:

"0520—Established Deepwater Point range wreck lighted buoy 'WR3D' in 42 feet of water." R. 120a, Ex. 33.

The Trial Judge also erred in concluding that there was not a statutory violation committed here calling into play the Pennsylvania Rule, and the Court of Appeals ignored that error. The law issue of violation of the Wreck Act, a Safety and Navigation Statute in the failure of the respondent to mark the wreck with a suitable lighted buoy was decided on clearly untenable grounds.

As stated above, the Trial Judge was wrongly concerned first with the claimed discretion granted by Coast Guard Regulation 62-5-40 and whether Navigation Manual provision 5-6-20 above quoted was or was not a Regulation having the force of law or statute. As pointed out, Section 5-2-20 is a requirement laid down by the Coast Guard for the suitable marking of a sunken wreck. This requirement, applicable to private or commercial owners of vessels, should be equally controlling on the respondent.

Obviously, the Wreck Statute, in providing for the marking of a wreck, means suitable markings. The character of the markings is clearly established in the Coast Guard Regulations and Supplementary Requirements established in the Aids to Navigation Manual of the Coast Guard.

This deceptively placed light, published as having 30 candlepower, had the illumination of only one candlepower. Respondent admitted that examination of the light batteries shortly after the collision showed them to 7 volts. R. 29a answer 83. The experts of both parties agreed that the light, reduced in voltage as it was found to be, showed only one candlepower. R. 69a.

The District Court's conclusion that the marker light showed an illumination of a 30 candle power light rests on unquestionably wrong premises. First, the District Court's statement that the *Cosmic's* pilot did not testify

that the dimness of the light contributed to the mishap is wrong beyond any doubt.

The pilot testified as follows:

> "Q. When did you see the green flashing light with relation to the time you saw the hulk itself? A. I saw them both about the same time.
>
> * * *
>
> "Q. Did you have to rely to any extent or not on the green light marking the stern of the wreck of the *'Mission San Francisco'* in timing your turn? A. If I had seen the green *light sooner, I think it would have been a big help.* I might have swung quicker, put to hard starboard rudder sooner perhaps.
>
> "Q. To what do you attribute the fact that you didn't see this flashing green light any sooner? A. *It was very dim that night.*
>
> "Q. Would you have put more rudder on the ship or would you have put rudder on the ship sooner if you had seen the light marking the wreck earlier? A. I think I would have, yes" (R. 65a-66a),

On cross-examination, the pilot further testified concerning his testimony given at the Coast Guard investigation held very promptly after the casualty:

> "By Mr. Wilson:
>
> "Q. Captain, do you recall what you had to say or what you had previously stated at the Coast Guard hearing with respect to the green light on the *'Mission San Francisco's'* (339) stern? A. I think I said it wasn't as bright that night as it had been. If I remember correctly, that is what I said.
>
> "Q. Well, you were asked this question—and I am referring to page 6, Captain:

"When you stated that the wreck was nearly ahead of your vessel, when you rounded off of Bulkhead Bar, how was she lighted or what did you see on the wreck?'

'And your answer was:

"*I saw a very dim green light with glasses.*"

'Is that correct?

"Mr. Wood: Mr. Wilson, you might read the next question and answer also.

The Court: Go ahead.

By Mr. Wilson:

Q. 'Was there any particular characteristic to this light? Answer: A flashing green light, but dimmer than usual.' A. If that is what it says there, it has got to be." (R. 67a).

So one premise of the Trial Judge is wrong. The other grounds are also clearly wrong, as outlined in the next paragraph and on pages 10-13.

Respondent's own evidence shows that the marker light was badly inadequate as examined right after the accident. It was therefore pronounced error of the District Court to adopt, as it did, other Coast Guard testimony that the marker light was "as good" before the accident as after. Being admittedly bad after the collision. no conclusion was possible except that the light was "just as bad" *before* the accident as it was after.

The Wreck Act being a Safety Statute and 33 CFR 64.01-1 (Appendix B, 20) imposes a mandatory and non-delegable personal duty on all Shipowners, whether it be a private commercial firm or the United States Government; *Snug Harbor,* 53 F. 2d 407, 411 (D.C. N. Y. 1931). The Court of Appeals for the Fourth Circuit stated in *Somerset Seafood Co.,* v. *U. S.,* 193 F. 2d 631, 634:

"As we read the Wreck Acts, the duty of the U. S. to mark or remove the wreck is mandatory. The appropriate federal agencies and officers decide merely the proper methods or measures."

A violation of the Wreck Act thus in effect is an automatic statutory fault. In the Petition of *Socony-Vacuum Transportation Co.*, 93 F. Supp. 718, 735 (S. D. N. Y. 1950), the Court stated:

> "Since the Choapa's obstruction of the channel constituted a statutory violation, she has the burden of showing that her fault in this respect could not have been the cause of the collision". Citing the *Pennsylvania, supra.*

The Pennsylvania Rule similarly was applied to violations of the Wreck Act in *Mattina* v. *Commercial Cable Company,* 1937 F. Supp. 472 (E. D. N. Y. 1956); *The Vera,* 224 Fed. 998, 1011 (D. C. Mass. 1914); *The Voco,* 93 F. Supp. 718, 735 (S. D. N. Y. 1950).

Plainly, the stated examination by the Circuit Court below of the record in this appeal (Opinion, Appendix A) overlooked and failed to take into account the foregoing considerations showing that the Wreck Act was violated by the respondent. Also that Court's absolution of the respondent in these circumstances cannot be otherwise than clearly erroneous. The non-application by both lower Courts of both the Pennsylvania Rule and the appeal review rule of McAllister v. U. S. is doubly clear.

So one premise of the Trial Judge is wrong. The other invalid premise is now discussed.

The other premise of the Trial Judge for ruling that the illumination of the improperly located marker light was normal is clearly invalid. This petitioner would not have appealed the decision if it constituted merely a resolution of an issue of fact on this point based on the Trial Court's acceptance of respondent's evidence as more credible than that of the petitioner. Nor would the petitioner in that event be making this application. But that is not the case.

While it is *not* stated in the Trial Judge's opinion, it is very plain from the events and Trial Judge's statements in the course of the trial, that he did not accept the re-

spondent's evidence in criticism of the light because he considered respondent's pilots' testimony as to the method of handling a large supertanker like *Cosmic* was in conflict with ship handling methods described by pilots of the same Association in a case he heard and decided five years earlier. This was the *Elna II-Mission San Francisco* collision, which caused the wreck of the Mission here involved. 179 F. Supp. 229.

The following comments of the Trial Judge in the course of the trial are pertinent:

> "The Court: * * * but at this stage I am warning you, gentlemen, I want this record amplified. I am not satisfied with the condition of it. I want these four pilots back again. I want to ask them some questions myself in view of the whole background of this case. It may be an unfortunate thing that I saw on the 'Mission San Francisco' case, but I did, *and I could try my best to forget what I heard in that case, but I warned you in all frankness that I might not be able to.* I want these pilots back and I want a fair chance *to go into the question of this turn.* (TR, 615-616) (Emphasis added)
>
> "Under these same conditions you have available witnesses here who have taken the *'Cosmic'* up the river. Now, *I want the four back that testified here.* We will arrange it, but I want them back, *because I have certain reservations about this whole thing,* and I want the record as full as I can, and I want it particularly on this point amplified. You can also put on an expert if you want to—I won't bar you from that—*but I want these four witnesses back on this point of making this turn*" (R. 81a). (Emphasis added)

As mentioned above, the Trial Judge admittedly "completely a landsman" not only substituted his landsman's judgment for using buoy or not to mark a wreck, but he also substituted his personal judgment as to the proper

method of handling of a supertanker (*Cosmic*) for that of experienced pilots who testified before him. This action resulted from his erroneous impression of the evidence in the earlier *Mission* collision case.

Thus, he found that any experienced pilot could safely navigate the *Cosmic* past the wreck even if its marker light was entirely out (R. 5a, Opinion, Fact Finding 13). It is very apparent that the Trial Judge considered that the matter of illumination given by the marker light was of trifling moment because the Trial Judge mistakenly viewed it as so simple for a ship like the *Cosmic* to make a turn near the wreck by holding close to the right edge of the channel.

It is clear that he doubted the pilots' testimony here that a supertanker such as the *Cosmic* had to be navigated near mid-channel and not close to the right-hand edge of the channel as would vessels of the *Mission San Francisco* size, and decided without stating so in his opinion that this testimony was in conflict with fellow pilots' earlier testimony that ships (referring to *Mission San Francisco* size) approaching the turn above which the wreck lay could and did hug the righthand edge of the channel. This led him to reject the pilots' testimony (although he did not say so in his opinion) criticizing the light's dimness and their testimony as to handling requirements for a deep draft tanker approaching the critical turn.

Quite plainly, the Trial Judge thought a vessel such as the *Cosmic* could and should be hugging the right edge of the channel and could easily make the turn to the right necessary just below the wreck's location. He overlooked or forgot the fact that the testimony of the pilots in the earlier case related to the handling of much smaller vessels than the *Cosmic* and vessels having a much lighter draft than the *Cosmic*. This led him to disbelieve the pilots' testimony in the instant case as to navigation requirements attending the *Cosmic* in approaching the turn immediately below the wreck.

The foregoing situation, rather than evidence before the Trial Judge in this trial, we submit, formed the grounds for his apparent acceptance of respondents' witnesses' unfounded testimony that the marker light was normally illuminated at the time of the accident. This was not a case of the Trial Judge having seen and heard witnesses of the petitioner and witnesses of the respondent on this issue, and accepting on the basis of the witnesses' appearance, demeanor, etc., the statements of the respondent's witnesses in preference to those of the petitioner. Instead, he preferred the respondent's evidence on the invalid ground that petitioner's witnesses' description of the proper method of navigational approach to the turn just below the wreck, showed them to be unreliable because he mistakenly thought that testimony was in conflict with the testimony in the other earlier case. The Trial Judge's resolution of the issue on these grounds was plainly erroneous.

Other considerations favoring acceptance of the petitioner's witnesses' criticism of the marker light were ignored, to which neither the Trial Court nor the Appellate Court gave consideration.

The evidence showed that the improperly located light, published as having 30 candle power, had an illumination of only 1 candle power. The respondent admitted that examination of the marker light shortly after the collision showed it to be only 1 candle power. That is, the experts produced by both parties agreed that the light reduced in voltage, as it was admittedly found to be reduced, showed only 1 candle power. Respondent's answers to interrogatories likewise admitted this fact, *supra*, p. 7. It was also physically demonstrated to the Trial Judge that a similar green light of only 1 candle power showed only a dim glow (R. 82a, 83a).

Petitioner has shown above that the Trial Judge was in error in stating in his opinion that the *Cosmic's* pilot did not testify that the dimness of the light contributed to the mishap. It is also plain that the Trial Judge wrongly doubted the veracity of the pilots in their criticism of the light's dimness because of his mistaken belief that the

same pilots had misinformed him as to the proper method of approaching and makin gthe turn with a deep draft supertanker.

The Trial Judge passed over and did not mention in his opinion (and the Court of Appeals overlooked this clear error) the testimony of five Delaware River pilots critical of the illumination of the light. We will not extend the petition with all the excerpts from the record, but the following are typical examples:

One pilot who saw the marker light minutes after the collision testified:

> "Well, when I saw it this time it was very dim. It was nowhere as bright as it had been, and it wasn't as bright as the surrounding lights to begin with, but this night it was very dim. It was practically out." (Ingram, L. App. 58a) (18)

Again, another pilot observing the wreck and its marker at about the time when the collision happened, testified:

> "A weak light, a weak flashing. A quick-flashing light is just like when a quick-flashing buoy starts to go; it gets weak.
>
> "Q. Was it any weaker or dimmer than you had seen it on previous occasions? A. Oh, yes" (L. App. 64a-65a) (19)

Nor did the Trial Court even mention the deposition testimony of the *Cosmic's* crew that the marker light was very dim and the wreck appeared to be a dark barge light object (R. 41a, 42a, 46a, 33, 34a). Nor did the Court of Appeals give heed to the omission of the Trial Court to even mention that critical testimony.

The marker light shortly after the collision was badly inadequate. Nevertheless, respondent's witnesses testified that it was just as good before the accident as after. Their testimony supporting the light's illumination before the collision was unacceptable on elementary standards of evidence evaluation.

Thus in substance the issue of the normal illumination of the light was resolved on invalid grounds. There was clear error in its resolution. The decision of the Court of Appeals omitting to correct this clear error was plainly wrong, since petitioner in its appeal met this Court's McAllister rule requirements.

Argument in Support of the Reasons for Granting the Writ

It is submitted that both lower Courts either overlooked or ignored that the respondent did not conform to its own regulations, nor did its servants comply wtih respondent's guiding instructions for the marking of a wreck. The marking was obviously deficient, contributing to *Cosmic's* sideswipe of the wreck. The wreck statute and the statutory regulations (by interpretation of the law) were violated, so that to absolve the respondent of negligence is clearly erroneous.

It is submitted that this erroneous result can be attributed to misapplication of this court's decisions in *The Pennsylvania* and *McAllister* v. *United States, supra.*

It is suggested that the great majority of admiralty practitioners countrywide would agree with a statement that, as a practical matter, the review and disposal of admiralty appeals (through misapplication of *McAllsiter* v. *United States*) has tended to impair substantially a party's rights of appeal. It appears that a party aggrieved by a judgment based on findings of fact which he considers clearly wrong is burdened to demonstrate beyond any doubt that the resolution of the evidence could not possibly be right. Successfully advancing grounds for persuasion that a mistake had been made appears to have become impossible as a practical matter.

Being aware that it is not the function of this Court in its exercise of its appellate jurisdiction to give redress of lower Federal Courts' possible erroneous disposition of

one given case, we offer the thought that it would be salutary to grant the writ here as an indication that there still is substance in a party's right of appeal from a judgment of the nature of the instant judgment. Such action, we submit, would have an effect of general importance in the trial and appeal of admiralty causes.

We are confident that the respondent's opposition to this application cannot unseat the grounds propounded for the granting of the writ requested.

WHEREFORE, upon this petition and the papers submitted herewith and upon any brief in opposition filed herein,

IT IS PRAYED

that this Court grant certiorari, and upon granting certiorari herein direct that the judgment of affirmance of the Court of Appeals for the Third Circuit dated May 4, 1966 be vacated and that that Court reconsider petitioner's appeal on the grounds of error herein asserted to be present in that Court's judgment of affirmance.

Dated: August 23, 1966.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 15575

HOME SHIPPING COMPANY, S.A., AS OWNER OF THE S/S *Cosmic*,
Libellant-Appellant,

v.

United States of America,
Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Argued April 11, 1966

Before McLAUGHLIN, GANEY and FREEDMAN, *Circuit Judges*

OPINION OF THE COURT

(Filed May 4, 1966)

PER CURIAM.

From our own examination of the record in this appeal we are satisfied that the decision of the district court that the respondent was guilty of no negligence in the marking of the wreck involved which contributed in any manner to the collision upon which this action is based is not clearly erroneous.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix B

14 USCA 2—Primary Duties

The Coast Guard shall enforce or assist in the enforcement of all applicable Federal laws upon the high seas and waters subject to the jurisdiction of the United States; shall administer laws and promulgate and enforce regulations for the promotion of safety of life and property on the high seas and on waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department; shall develop, establish, maintain and operate, with due regard to the requirements of national defense, aids to maritime navigation, ice-breaking facilities, and rescue facilities for the promotion of safety on and over the high seas and waters subject to the jurisdiction of the United States; and shall maintain a state of readiness to function as a specialized service in the Navy in time of war. Aug. 4, 1949, c. 393, § 1; 63 Stat. 496.

33 USCA 409—Obstruction of navigable waters by vessels; floating timber; marking and removal of sunken vessels

It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; or to float loose timber and logs, or to float what is known as "sack rafts of timber and logs" in streams or channels actually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation. And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the

sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provided for in sections 411-416, 418, and 502 of this title. Mar. 3, 1899, c. 425, § 15, 30 Stat. 1152.

33 CFR 62.25-1—General

(a) The waters of the United States are marked to assist navigation by a lateral system of buoyage for use with charts. This system employs a simple arrangement of colors, shapes, numbers and light characteristics to show the side on which a buoy should be passed when proceeding in a given direction. The characteristics are determined by the position of the buoy with respect to the navigable channels as the channels are entered from seaward toward the head of navigation. * * *

[CGFR5-15, 18 F.R. 4, Jan. 1, 1953, as amended by CGFR 58-50, 24 F.R. 5606, July 11, 1959]

33 CFR 62.25-5—Colors

When proceeding from seaward:

(a) Black buoys mark the port (left) sides of channels, or the location of wrecks or obstructions which must be passed by keeping the buoy on the port (left) hand.

(b) Red buoys mark the starboard (right) sides of channels, or the location of wrecks or obstructions which must be passed by keeping the buoy on the starboard (right) hand.

Appendix B

33 CFR 62.25-20—Light color characteristics

Red lights on buoys are used only on red buoys or red and black horizontally banded buoys with the topmost band red. Green lights on buoys are used only on the black buoys or black and red horizontally banded buoys with the topmost band black. White lights on buoys are used on any color buoy. No special significance is attached to a white light on a buoy, the purpose of the buoy being indicated by its color, number, or its light phase characteristic.

33 CFR 62.25-40—Buoys marking wrecks

Buoys established by the Coast Guard to mark wrecks are generally placed on the seaward or channel side of the wreck and as near to the wreck as conditions will permit.

33 CFR 64.01-1—Markings required

When a vessel, raft, or other craft is wrecked and sunk, accidentally or otherwise, in the navigable waters of the United States, the owner thereof has a nondelegable statutory duty to mark immediately such sunken wreck with a buoy or daymark the day and a lighted lantern at night, and to maintain these required markings until the sunken craft is removed or abandoned or abandonment is otherwise determined by the Corps of Engineers. Such markings shall conform to the lateral system of buoyage characteristics (see Subpart 62.25 of this subchapter): *Provided,* That until the owner has the opportunity to establish such standard markings he shall maintain the most suitable markings available under the circumstances which will warn the navigator of the sunken wreck.

Appendix B

USCG Aids to Navigation Manual, Chapter 5

5-1-5—Purpose

A. The purpose of this chapter is to set forth procedures and requirements for the guidance of all persons in the Coast Guard concerned with administering the provisions of Title 33, Part 64, Code of Federal Regulations.

5-1-10—Definitions

(3) *Suitable* means that it must be fitting and appropriate to accomplish the purpose intended. When an owner is unable to establish immediately a standard marking as hereinafter described, he is permitted by regulation to establish the most suitable temporary marking available under the circumstances, which shall include a light by night, and to maintain this temporary marking for a reasonable time pending the removal or abandonment of the wreck, or the establishment of a standard marking. Determination of suitability of the temporary markings and the reasonableness of time permitted before a standard marking is required to be established is dependent upon the individual circumstances of each case.

5-6-20—Location of Lateral Markings

A. Markings shall be placed on the seaward or channelward side of the wreck as near to the wreck as possible, and shall be so located that a vessel may pass close aboard the marking with safety.

B. If necessary, in order to reduce any possibility of confusion, more than one aid shall be used.

5-7-15—Establishing Wreck Markings

A. When establishing aids to navigation to mark a sunken wreck, the commanding officer shall adhere to the provisions of Part 5-6 with respect to any details of the

marking not otherwise specified by the District Commander.

28 USCA 52—Rule 52(a), Federal Rules of Civil Procedure

Rule 52—Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to a Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended Jan. 21, 1963, eff. July 1, 1963.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 474

HOME SHIPPING COMPANY, S.A., AS OWNER OF THE S.S. "COSMIC," PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner instituted this action under the Suits in Admiralty Act, 46 U.S.C. 741 *et seq.*, seeking a judgment of $600,000 against the United States for damages incurred when the S.S. *Cosmic*, petitioner's ship, struck the partially sunken, marked wreck of U.S.N.S. *Mission San Francisco*. The alleged fault of the United States as owner of the wreck, upon which the action was based, lay in the mode of marking the stern of the wreck, which protruded into the channel. The stern was marked with a quick-flashing green light placed on its deck.

After a lengthy trial, the district court found for

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the United States (L. App. 2a,[1] 239 F. Supp. 226 (D. Del.)). The court found that at the time of the collision the wreck was marked with appropriate buoys and lights in accordance with an agreement reached at a meeting attended by the president of the local pilots association and with the Wreck Act, 33 U.S.C. 409, and the Coast Guard's applicable regulation; that the pilot in charge of the *Cosmic* had an intimate personal knowledge of the location of the wreck and the lights and buoys marking it; that any experienced pilot should have been able to pilot the *Cosmic* past the stern of the *Mission* on a clear night (as was the night of the collision) even if the green light on the *Mission*'s stern had been out entirely; that the green light on the *Mission*'s stern was not out at the time of the collision, but was shining substantially at its normal brilliance,[2] was unobstructed, and was plainly visible long before necessary for navigational purposes; and that there was no causal connection between the degree of brightness of the light or its location and the collision. The court concluded that there had been no negligence or fault on the part of the United States, that the wreck had been properly marked, and that the collision had been caused solely by the *Cosmic*'s navigational error and/or faulty rudder.[3]

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[1] "L. App." references are to the printed appendix filed below by petitioner. "R. App." references are to the reproduced appendix filed below by the United States.

[2] This finding in turn rested on the court's subsidiary finding that the voltage drop reported some six hours later was caused by damage to the batteries resulting from the collision.

[3] The court also found that the *Cosmic*'s log had been altered so that the original entry, which stated that the collision had

On appeal, the court of appeals affirmed *per curiam*, ruling that the district court's finding that the United States was guilty of no negligence was "not clearly erroneous" (Pet. 17, 359 F. 2d 435 (C.A. 3)).

The only issues here are factual ones, and in order to recover petitioner would have to overcome three separate findings of the district court each of which is dispositive: (1) that the United States was guilty of no negligence in marking the wreck of the *Mission*; (2) that there was no causal connection between the manner in which the wreck was marked and the collision; and (3) that the collision was caused solely by a faulty rudder and/or navigational error on the part of the *Cosmic*. Each of these findings has ample support in the record,[4] including the crucial issue whether the marker light was dim and inadequate before the collision scattered the batteries (*e.g.*, R. App. 67a; 10a; 12a; 19a; 21a; 54a; 74a; 90a; 91a; 92a).[5] To the extent there was conflicting testimony, it was a matter for the trier of fact. The suggestion by peti-

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been due to poor maneuvering of the pilot, had been changed to place responsibility on the alleged inadequacy of the marker light.

[4] Petitioner's construction of the Wreck Act and the Coast Guard regulations and manual would require that the wreck have been marked by a buoy that would have narrowed the channel still further and been prone to being dislodged by passing ships. See 239 F. Supp. at 231. Placing the light on the floating wreck, as the court found, had been found the most efficacious marking at a meeting which included the president of the local pilots association.

[5] The testimony set out by petitioners at Pet. 14 appears to relate to the period *after* the *Cosmic*'s collision.

tioner (Pet. 15) that the "clearly erroneous" rule does not apply in admiralty cases has been resolved to the contrary by this Court (*McAllister* v. *United States,* 348 U.S. 19), and is particularly inappropriate now that the Federal Rules of Civil Procedure, including Rule 52(a), apply expressly to admiralty cases. Since two courts have agreed on the proper resolution of the factual disputes, further review is not warranted. *E.g., Graver Tank & Mfg. Co.* v. *Linde Air Products Co.,* 336 U.S. 271, 275.

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

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Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondent's memorandum filed in opposition to the petition herein is mistaken in its assertion (Respondent's memorandum, 3, 4) that petitioner suggested that the "clearly erroneous" rule of this Court (*McAllister* v. *United States*, 348 U. S. 19, 20) does not apply in admiralty.

Instead, petitioner contends (Petition, 2, 15) that the Court of Appeals for the Third Circuit misapplied the

stated rule; as is the general but not uniform tendency of Federal appellate tribunals.

Also, the Appellate Court below permitted errors of law to stand uncorrected which were misconceived to be "fact" issues having the protection of the stated rule. Respondent repeats this error in its presentation opposing granting the writ.

Dated: September 28, 1966.

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